STATE OF MICHIGAN

COURT OF APPEALS

WILLIE JOHNSON, as Personal Representative of the Estate of VIOLET RICHARDSON, Deceased,

Plaintiff-Appellee,

v

HENRY FORD HOSPITAL,

Defendant-Appellant,

and

SAIED MIRAFZALI, M.D., DR. SHAZAD KHAN, DR. MOHAMMED AKKAD, DR. WONG, and BECKY DECARLOS, P.A.,

Defendants.

UNPUBLISHED
March 22, 2005

No. 250874
Wayne Circuit Court
LC No. 01-115397-NH

WILLIE JOHNSON, as Personal Representative of the Estate of VIOLET RICHARDSON, Deceased,

Plaintiff-Appellee,

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HENRY FORD HOSPITAL,

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SAIED MIRAFZALI, M.D., DR. SHAZAD KHAN, DR. MOHAMMED AKKAD, DR. WONG, and BECKY DECARLOS, P.A.,

Defendants.

No. 251542
Wayne Circuit Court
LC No. 01-115397-NH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant, Henry Ford Hospital, appeals as of right a jury verdict in favor of plaintiff, Willie Johnson, as personal representative of the estate of Violet Richardson, who died on October 3, 1998, after being admitted for medical treatment on October 1, 1998. We affirm in part, reverse in part, and remand for amendment of the order of judgment to reflect the application of the lower statutory cap on the noneconomic damages awarded pursuant to MCL 600.1483 and for amendment of the order awarding costs.

On appeal, defendant first argues that the trial court erred in denying its motion for judgment notwithstanding the verdict because plaintiff's experts' testimony and theories were without factual support and based on speculation or conjecture, or were insufficient under MCL 600.2912a(2). After de novo review, viewing the evidence in a light most favorable to the nonmoving party, we disagree. See *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004).

To prove a medical malpractice claim a plaintiff must establish the appropriate standard of care, its breach, and injuries to plaintiff that proximately resulted. *Id*. at 86. Expert testimony is required to articulate the standard of care and to establish its breach. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 216; 642 NW2d 346 (2002). Here, plaintiff's standard of care expert, Dr. Robert Stark, testified that plaintiff's decedent was hospitalized for a lupus flare-up that resulted in severe anemia, due to hemolysis and menstruation, and thrombocytopenia. On admission she was short of breath and her hemoglobin and platelet counts were dangerously low. She was transfused with one unit of blood and steroids were started. A hematologist was consulted and recommended transfusion if the patient was bleeding. The patient's hemoglobin and platelet counts remained dangerously low and she was not transfused. Dr. Stark further testified that the standard of care under the circumstances would have been to transfuse. Dr. Shazad Khan, however, who saw the patient on October 3, the third hospital day, noted that the patient had generalized tiredness and was passing clots through her vagina, a sign of heavy menstruation according to Drs. Stark and Spitz, and still did not transfuse. Instead, he recommended waiting twenty-four hours and to transfuse if she started to bleed heavily or became "symptomatic."

At 2:00 p.m., on this third day, the patient became "symptomatic" when she began, again, to experience shortness of breath. Dr. Khan was called by the nurse with this change of condition and he still did not transfuse. The patient's condition became fatal two hours later. Dr. Stark testified that the standard of practice would have been to transfuse, in light of the continued low hemoglobin and platelet levels, the tiredness, shortness of breath, and continued heavy menstruation, i.e., the clinical picture presented. Dr. Khan's failure to transfuse constituted a breach in the standard of practice which resulted in the patient's death. She, essentially, "bled" to death in that her blood was lacking the critical oxygen-carrying capacity to sustain life. Defendant's claim that Dr. Stark testified that plaintiff's decedent died solely from heavy menstruation is a mischaracterization. Throughout his testimony Dr. Stark referred to both the severe anemia, caused by hemolysis and menstruation, and thrombocytopenia, which caused the heavy menstruation.

Similarly, plaintiff's other expert, Dr. Werner Spitz, testified that the patient's death could have been prevented had the standard of care not been breached, i.e., if the patient had received the much needed transfusion. He further testified that the cause of death was "blood loss" which means that the patient's blood lost its vital oxygen-carrying capacity due to the anemia which was caused by the hemolysis and menstruation. The lack of platelets contributed to the excessive menstruation.

Defendant's claim that plaintiff's expert testimony was lacking is premised primarily on evidence of the state of menstruation and stable vital signs, the autopsy results, and Dr. Spitz's testimony allegedly "negating" Dr. Stark's testimony. These arguments are groundless. There was evidence of both "light" and "heavy" menstruation. Evidence of stable vital signs does not answer plaintiff's claim that the quality, not the quantity, of blood was critically deficient. That the autopsy results did not support a claim that the patient "was almost out of blood" is irrelevant because plaintiff's theory was that the blood lacked critical oxygen-carrying capacity. Dr. Spitz's testimony was consistent with Dr. Stark's—in light of the severe anemia and thrombocytopenia, plaintiff's decedent needed a transfusion and because she did not receive it, she died. Further, contrary to defendant's claim, plaintiff's experts did establish that plaintiff's decedent lost an opportunity to survive that was greater than fifty percent.

In sum, defendant's motion for JNOV was properly denied because, viewed in a light most favorable to plaintiff, plaintiff's expert testimony and theories relating to the standard of care and its breach were adequately supported by the record evidence and were sufficient. See *Craig*, *supra*. That defendant's own experts disputed that a blood transfusion was medically necessary or even appropriate does not cause plaintiff's experts' opinions to be "without factual support" or insufficient. Which experts to believe was for the jury to determine. See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Reasonable jurors could honestly have reached different conclusions and this Court may not substitute its judgment for that of the jury. See *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

Next, defendant argues that its motions for summary disposition, directed verdict, and JNOV should have been granted because Dr. Stark was not qualified to testify under MCL 600.2169 since he did not devote a majority of his professional time to the practice of internal medicine. On de novo review of the trial court's decisions on these motions, we consider whether the trial court abused its discretion in qualifying and admitting Dr. Stark's testimony and conclude that it did not. See *Craig*, *supra* at 77; *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004); *Tate*, *supra* at 215; *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

In response to plaintiff's complaint and affidavit of merit, defendant moved for summary disposition and/or to dismiss arguing that plaintiff failed to file a proper affidavit of merit because Dr. Stark was not qualified under MCL 600.2169 as evidenced by the admission in his affidavit of merit that he estimated fifty percent of his time was devoted to the practice of internal medicine and fifty percent was devoted to the practice of cardiology. The trial court denied the motion, holding that the case involved issues of internal medicine and Dr. Stark's background was in internal medicine. Another motion for summary disposition, and motions for directed verdict and JNOV followed, raising the same argument—Dr. Stark was not qualified to render expert testimony because a majority of his practice was in cardiology, not internal

medicine. The trial court denied all motions, primarily holding that the practice of an internal medicine specialist was at issue, Dr. Stark was board certified in internal medicine, and, basically, cardiology is simply a subspecialty of internal medicine. We agree with the trial court.

MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
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> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
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> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

Here, the only physician that was alleged to have committed malpractice was Dr. Khan who is board certified in internal medicine. It is undisputed that Dr. Stark is board certified in internal medicine. Defendant has persistently argued that because Dr. Stark practices cardiology, a subspecialty of internal medicine, for a "majority of his professional time," he is not qualified to render an opinion as to the standard of care in a case that involves only an internal medicine issue. But, in *Hamilton v Kuligowski*, 261 Mich App 608; 684 NW2d 366 (2004), this Court accepted the plaintiff's argument that the practice of a subspecialty of internal medicine is merely "a more focused application of internal medicine, but internal medicine nonetheless." *Id.* at 611. In that case, the malpractice issue was whether the defendant was negligent with regard to his care of a stroke patient. *Id.* at 609. Defendant argued that plaintiff's expert was not qualified under MCL 600.2169 because, although board certified in internal medicine, he subspecialized in infectious disease and devoted a majority of his professional time to the practice of that subspecialty. *Id.* at 610. To the contrary, the defendant, also board certified in internal medicine, devoted a majority of his professional time to the practice of his subspecialty, geriatric medicine. *Id.* at 610. Defendant claimed that, because their subspecialties were not the same, plaintiff's expert was not qualified to render expert opinion testimony. *Id.* The trial court

agreed with defendant, but this Court reversed that decision, declining to "graft a requirement for matching subspecialties onto the plain 'specialty' language of MCL 600.2169(1)." *Id*. at 611.

We agree with the *Hamilton* decision and conclude that this case presents an even stronger argument in support of the proposition that subspecialties need not match to meet the requirements of MCL 600.2169(1). Here, Dr. Khan is board certified in internal medicine and did not subspecialize in any area of internal medicine at the time this action arose. Dr. Stark is board certified in internal medicine and did subspecialize in an area of internal medicine, cardiology. The malpractice issue is whether Dr. Khan should have ordered a transfusion to treat plaintiff's decedent's condition—an issue within the ambit of the practice of internal medicine. Both Dr. Khan and Dr. Stark specialize in internal medicine. That Dr. Stark is also able to diagnose and treat cardiology issues, in addition to general internal medicine issues, does not in any way render him unqualified or incompetent to testify as to a standard of care issue arising in internal medicine. This is not a case in which Dr. Khan subspecialized in an area of internal medicine and treated plaintiff's decedent for a condition unique to the practice of that subspecialty. If that were the case, defendant might have a stronger argument. Accordingly, we conclude that the trial court did not abuse its discretion when it denied defendant's several motions premised on this ground.

Next, defendant argues that the trial court erred in denying its (1) motion for directed verdict as to all claims of malpractice other than those based on the conduct of Dr. Khan, and (2) request for a verdict form that explicitly limited liability as to such conduct. After de novo review, we disagree. See *Merkur Steel Supply, Inc, supra*.

Defendant argues that during the trial plaintiff's counsel and his witnesses referred to "they" repeatedly, which gave the jury the misimpression that physicians other than Dr. Khan committed malpractice. Therefore, defendant moved for directed verdict as to these "claims," which was denied by the trial court on the ground that defendant was the only defendant for which legal claims existed. We agree that it was clear that defendant was the only defendant remaining in the case. Additionally, it was clear that Dr. Khan's conduct was the only conduct at issue. Dr. Stark testified that the only malpractice that was alleged to be committed was Dr. Khan's failure to transfuse in light of plaintiff's decedent's clinical picture. Dr. Stark was specifically asked whether Dr. Akkad, Dr. Mirafzali, or Dr. Wong committed malpractice and he testified that neither Drs. Akkad nor Mirafzali committed malpractice and that he was not qualified to criticize the treatment rendered by Dr. Wong, a hematologist. There is no evidence that supports defendant's argument that there were accusations of malpractice against any physician other than Dr. Khan. Even in plaintiff's counsel's closing argument he repeatedly referred to Dr. Khan as the physician who violated the standard of practice. Accordingly, defendant's motion for directed verdict in this regard was properly denied. Similarly, because it was clear that only Dr. Khan's conduct was at issue, the trial court properly denied defendant's request for a verdict form that explicitly limited liability to such conduct.

Next, defendant argues that the trial court abused its discretion in denying its motion for a new trial because the jury was instructed under M Civ JI 50.10 and 50.11 and these instructions were factually inapplicable. See MCR 2.611; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). We disagree and, after reviewing the trial court's decision regarding these jury instructions for an abuse of discretion, conclude that they were applicable and adequate in light of the law, evidence, and theories advanced by the parties. See *Joerger v*

Gordon Food Service, Inc, 224 Mich App 167, 173; 568 NW2d 365 (1997).

M Civ JI 50.10 provides, in pertinent part:

> You are instructed that the defendant takes the plaintiff as it finds her. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence.

M Civ JI 50.10, instructs on "a basic tort rule of law—a tortfeasor takes his victim as he finds him." *Richman v Berkley*, 84 Mich App 258, 261; 269 NW2d 555 (1978). It relates to damages and its purpose is to aid the jury in evaluating damages. See *Wincher v Detroit*, 144 Mich App 448, 456; 376 NW2d 125 (1985). Defendant argues that the instruction was inapplicable because "[t]he critical causation issue in this case was whether plaintiff's death was in fact caused by her susceptibility to injury due to the preexisting condition of lupus, by virtue of a complication of that disease, Evan's Syndrome." And, the instruction permits the jury to conclude that plaintiff's decedent's "injuries were due to her unusual susceptibility to injury (i.e., lupus), and yet still find that [she] had suffered damages caused by defendant's negligence." Defendant's interpretation is erroneous. This instruction on the issue of damages only becomes relevant *after* the jury concludes that defendant was negligent and that such negligence was a cause of plaintiff's decedent's death. Then, it instructs the jury that, even if plaintiff's decedent was unusually susceptible to injury, defendant could still be liable for damages that were proximately caused by its negligence. In sum, the instruction was proper.

Defendant also argues that M Civ JI 50.11 was erroneously read to the jury because there was no issue of apportionment of damages since death was the indivisible injury resulting from the alleged malpractice. M Civ JI 50.11 provides, in pertinent part:

> If an injury suffered by plaintiff is a combined product of both a preexisting [disease/injury/state of heath] and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused defendant's by conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.
>
> However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

Again, defendant misinterprets the instruction. This instruction provides for the apportionment of damages when the injury is caused by both a preexisting disease and defendant's negligence so that only those damages flowing from the negligent conduct are awarded, if possible.

Here, there was evidence from which a jury could have found that plaintiff's decedent's preexisting disease, lupus, and defendant's negligence combined to cause her death. There can be more than one proximate cause of injury. *Hagerman v Gencorp Automotive*, 457 Mich 720, 729; 579 NW2d 347 (1998). If the jury had so decided, the instruction required that the jury determine which damages directly flowed from each cause, if possible, and only hold defendant responsible for those damages resulting as a consequence of its negligence. For example, if the

jury determined that plaintiff's decedent's life expectancy of thirty years was diminished by twenty years as a consequence of the severity of her lupus, it may award damages based on that conclusion, i.e., for a loss of the ten years caused by defendant's negligence. In sum, the instruction was proper. Therefore, the trial court properly denied defendant's motion for a new trial on the ground that the jury was improperly instructed.

Next, defendant argues that it is entitled to a new trial because plaintiff's economics expert's testimony was based on "speculation of future damages premised on a completely conjectural career change for which there are no facts in evidence [and was] patently inadmissible, requiring a new trial." Defendant's argument does not include the claim that loss of earning capacity was an inappropriate consideration; thus, we assume without deciding that loss of earning capacity was potentially recoverable in this case. We conclude that the admission of this expert testimony did not constitute an abuse of discretion entitling defendant to a new trial. See *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999).

Damages are awarded to compensate for injuries suffered. *Stillson v Gibbes*, 53 Mich 280; 18 NW 815 (1884). Loss of earning capacity is a type of future economic damage and is the amount that the plaintiff could have earned, not what the plaintiff would have earned, but for the injury. *Prince v Lott*, 369 Mich 606, 610; 120 NW2d 780 (1963). The damages must be reasonably certain to occur and may not be purely speculative. *Id*. at 609. As stated in Patek, McLain, Granzotto & Stockmeyer, 1 Michigan Law of Damages and Other Remedies (ICLE), § 4.10, p 4-8:

> Every loss of earning capacity damage claim is unique, as are the proofs required in each case. For example, the evidence presented for an infant's loss of earning capacity claim is very different than what is presented for the claim of a middle-aged practicing surgeon. Nevertheless, each is entitled to recover if they can prove that their loss will occur to a reasonable degree of certainty as a result of the injury suffered. Age, gender, race, occupation, education, locality, and level of impairment are just a few of the variables to be considered in determining loss of earning capacity.
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> * * *
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> *Plaintiffs with undeveloped careers*: Plaintiffs who have not yet reached their ultimate career goal may nevertheless recover for loss of earning capacity if they have exhibited a definite interest in that career. Sufficient evidence of career interest includes enrollment in education and training programs, the purchase of equipment and tools of the trade, and the pursuit of financial backing for the career. In some circumstances, the mere oral expression of genuine intent is sufficient to submit the issue to the trier of fact. [*Id*. at 4-8, 4-9.]

Here, Dr. Robert Ancell testified that he reviewed plaintiff's decedent's work and educational background, as well as her activities of daily living, to determine her lost earning capacity. He testified that at the time of her death, plaintiff's decedent was working as a bus attendant for the Detroit Board of Education but had an associate degree and a greater earning potential. He also testified that plaintiff's decedent wanted to be a special education teacher and was capable of meeting that objective in light of her lack of physical limitations and educational

background. Plaintiff's decedent's sisters, Juliet and Velita, testified that their sister wanted to be a teacher, was working towards that goal, and was registered at Marygrove College at the time of her death. Decedent's husband, Willie, testified that his wife wanted to be a teacher and he had taken her to Marygrove College to register.

We conclude that there were sufficient facts in evidence to support the expert testimony. A claim for loss of earning capacity damages is inherently speculative by its nature. See, e.g., *Thompson v Ogemaw Co Bd of Road Comm'rs*, 357 Mich 482, 490; 98 NW2d 620 (1959). Here, however, such speculation is at a tolerable minimum. The evidence presented included that plaintiff's decedent had successfully completed one degree, intended on pursuing another in teaching, had registered at a college toward that end, was only forty years old and physically capable of continuing her education and performing the tasks that a teacher is required to perform, and had worked for the school system for years. The testimony was sufficiently supported and its admission did not constitute an abuse of discretion.

Next, defendant argues that it is entitled to a new trial because plaintiff was permitted to introduce evidence of wage loss suffered by decedent's husband after her death and such damages are not recoverable under the wrongful death act. We disagree and conclude that the admission of this evidence does not constitute an abuse of discretion entitling defendant to a new trial. See *Sackett v Atyeo*, 217 Mich App 676, 682; 552 NW2d 536 (1996).

The wrongful death act, MCL 600.2922, provides, in pertinent part:

> (6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

In *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538; 302 NW2d 537 (1981), a case involving the interpretation of the no-fault act, our Supreme Court made a brief reference to the breadth of the wrongful death act stating: "[u]nder our wrongful death act, a survivor's recoverable economic losses include, at a minimum, the loss of financial support from the deceased and the loss of services that the survivor would have received from the deceased had he lived." *Id*. at 560, citing Wade, ed, The Michigan Law of Damages (ICLE), Part 2, pp 2-4 - 2-11. Similarly, M Civ JI 45.02, the instruction pertaining to damages in a wrongful death case, provides that damages may be awarded for "loss of financial support, loss of service, loss of gifts or other valuation gratuities, loss of parental training and guidance, loss of society and companionship," and then there are blanks for the insertion of other appropriate damages.

Here, the decedent's husband testified that he could not maintain steady employment after his wife's death because he had to take care of their four-year-old son and was unable to work the required hours and maintain a constant work schedule. Plaintiff's economics expert, Dr. Ancell, testified that decedent's husband had to quit work to care for his son after his wife died and lost wages as a consequence. This wage loss testimony was relevant to quantify the loss of services suffered as a result of the decedent's death—if she had not died, she would have

provided the services for which her husband had to forfeit his job. It was for the jury to determine whether the decedent's husband's wage loss was a persuasive measure of these damages. Therefore, the trial court did not abuse its discretion in admitting this testimony.

Next, defendant argues that the cap on noneconomic damages, MCL 600.1483, should be applied to the jury's award and, further, it should be the lower cap. Plaintiff agrees that, in light of *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), the cap would apply but argues that the cap is an unconstitutional violation of the right to a trial by jury and the separation of powers doctrine. Plaintiff further argues that, if it is not unconstitutional, the higher cap should apply because plaintiff's decedent suffered the requisite impaired cognitive capacity after 2:00 p.m. on the day she died.

We conclude that the cap on noneconomic damages provided for in MCL 600.1483 must be applied because it does not violate the constitutional right to a trial by jury or the separation of powers doctrine for the reasons detailed in *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004) and *Zdrojewski v Murphy*, 254 Mich App 50, 81-82; 657 NW2d 721 (2002). We next turn to whether the higher or lower cap applies. Although the trial court did not decide this issue, we will because it is one of law for which all of the necessary facts are presented. See *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997).

MCL 600.1483 provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
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> (a) The plaintiff is a hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
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> (i) Injury to the brain.
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> (ii) Injury to the spinal cord.
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> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing activities of normal, daily living.
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

Plaintiff argues that his decedent had "permanently impaired cognitive capacity," consistent with MCL 600.1483(1)(b), about an hour before her death. He asserts that evidence indicated she was

restless, breathing laboriously, weak, and had slurred speech. This evidence is insufficient as a matter of law to prove the requisite cognitive impairment, particularly in light of her husband's testimony that when he walked into her room during the Code Blue she appeared to recognize him and was "looking at him for help." There was no persuasive evidence to substantiate plaintiff's position. Accordingly, we remand this matter to the trial court for the purpose of imposing the lower cap on the noneconomic damage award pursuant to MCL 600.1483.

Next, defendant argues that the award of costs in plaintiff's favor should be vacated if we reverse the judgment because plaintiff would not be the prevailing party under MCR 2.625. Because we have affirmed the judgment in all regards except for the application of the noneconomic statutory cap, we need not consider this issue.

Finally, defendant argues that the trial court abused its discretion when it awarded plaintiff certain costs not authorized by statute. See *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996). We agree.

Defendant first claims that plaintiff should not have been awarded an expert witness fee under MCL 600.2164 for Dr. Bader Cassin because he was not retained by plaintiff and did not testify on his behalf. Plaintiff claims that, because Dr. Cassin performed the autopsy, plaintiff was entitled to reimbursement of the fee paid to learn his opinion in preparation for trial. Plaintiff cites *Barnett v Int'l Tennis Corp*, 80 Mich App 396, 414; 263 NW2d 908 (1978) in support of his position. But, that case states: [i]t is proper to tax as cost fees paid to the expert in connection with his or her preparation for trial." Plaintiff is arguing that he sought Dr. Cassin's opinion in connection with his own preparation for trial–not this expert's preparation for trial. "[P]reparation fees incurred by the prevailing parties' expert witnesses" are a recoverable cost to the prevailing party. See *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). Since Dr. Cassin was not plaintiff's expert witness he could not have incurred preparation fees on plaintiff's behalf; therefore, plaintiff was not entitled to an award of these costs.

Defendant next claims that plaintiff should not have been awarded costs associated with photocopying records for plaintiff's experts. Plaintiff argues, without citation to statutory authority in his brief on appeal, that his experts had to have the copies of documents and depositions for trial preparation purposes. If plaintiff is relying on MCL 600.2164, such reliance is misplaced because the copying costs were not "incurred by the prevailing parties' expert witness;" rather, the costs were incurred by plaintiff. However, review of plaintiff's Bill of Costs filed in the trial court reveals that plaintiff was relying on MCL 600.2549, which provides:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Obviously, this statute does not support plaintiff's position. Accordingly, plaintiff was not entitled to award of these costs.

Defendant next claims that plaintiff was not entitled to recover the $75 mediation fee. Plaintiff does not contest this point. In *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App

421, 429; 552 NW2d 466 (1996), this Court specifically held that mediation fees were not a recoverable cost. Therefore, plaintiff was not entitled to an award of this cost. In sum, all of the disputed costs were improperly imposed as unsupported by statutory authority; therefore, we remand this matter to the trial court for modification of its order awarding such costs.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello